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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Sep 22, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

OOH! MEDIA LLC, a Washington limited  
liability company, and KEVIN “TED”  
CARROLL, an individual,

Plaintiffs,

v.

SPOKANE TRANSIT AUTHORITY, a  
Washington municipal entity, and SUSAN  
MEYER, individually and as chief  
executive officer of Spokane Transit  
Authority,

Defendants.

No. 2:19-CV-00335-SAB

**ORDER GRANTING  
DEFENDANTS’ MOTIONS FOR  
SUMMARY JUDGMENT;  
DISMISSING CASE WITHOUT  
PREJUDICE**

Before the Court are Plaintiffs’ Motions for Partial Summary Judgment, ECF Nos. 40, 44, and 57 and Defendants’ Motions for Partial Summary Judgment, ECF Nos. 45 and 49. A hearing on the motions was held on September 11, 2020 by videoconference. Plaintiffs were represented by William C. Schroeder and Jeffrey Finer; Defendants were represented by John Riseborough, Nicole Luth, Matthew Niemela, and Brant Olson.

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**ORDER GRANTING DEFENDANTS’ MOTIONS FOR SUMMARY  
JUDGMENT; DISMISSING CASE WITHOUT PREJUDICE \* 1**

## Motion Standard

2       Summary judgment is appropriate “if the movant shows that there is no  
3 genuine dispute as to any material fact and the movant is entitled to judgment as a  
4 matter of law.” Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless  
5 there is sufficient evidence favoring the non-moving party for a jury to return a  
6 verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250  
7 (1986). The moving party has the initial burden of showing the absence of a  
8 genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).  
9 If the moving party meets its initial burden, the non-moving party must go beyond  
10 the pleadings and “set forth specific facts showing that there is a genuine issue for  
11 trial.” *Anderson*, 477 U.S. at 248.

12 In addition to showing there are no questions of material fact, the moving  
13 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*  
14 *Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled  
15 to judgment as a matter of law when the non-moving party fails to make a  
16 sufficient showing on an essential element of a claim on which the non-moving  
17 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party  
18 cannot rely on conclusory allegations alone to create an issue of material fact.  
19 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

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**ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; DISMISSING CASE WITHOUT PREJUDICE \* 2**

## Background Facts

2 Plaintiffs Ooh Media! and Ted Carroll, owner of Ooh Media!, had a contract  
3 with Defendant Spokane Transit Authority<sup>1</sup> to procure, place, and remove third-  
4 party advertisements on the sides of Defendant's buses. Under the contract,  
5 Plaintiffs made the initial determination of whether a proposed ad complied with  
6 STA's ad policy. If they were unable to make a determination, the decision was  
7 referred to the Director of Communications. Defendant Susan Meyer, STA's Chief  
8 Executive Officer had the final word on the ad's content.

Beginning in 2011, problems emerged regarding whether certain advertisements could be placed on the buses. STA adopted its current Commercial Advertising Policy (“Ad Policy”) in 2012. The Ad Policy permits advertising space for only two types of ads: (1) commercial and promotional advertising; and (2) public service announcements.

14 A disagreement arose when a labor union wanted to place an ad on STA's  
15 buses. In 2016, Amalgamated Transit Union ("ATU") Local 1015 emailed  
16 Plaintiffs about purchasing ad space on STA buses. Plaintiffs responded to ATU  
17 that the proposed ad did not meet STA's Ad Policy. ATU then sent a letter to STA,  
18 indicating its concern that the Ad Policy was anti-union and possibly violated the  
19 First Amendment. As a result, STA officials met with ATU officials. STA officials  
20 asked ATU to submit an ad copy to Plaintiffs with the goal of creating an ad with  
21 acceptable content.

22 ATU then submitted a proposed ad to Plaintiffs. Plaintiffs approved the ad  
23 and informed ATU they were ready to move forward with the ad and offered a  
24 pricing rate. Pursuant to STA's request, Plaintiffs forwarded a copy of the  
25 proposed ATU ad to STA. STA asked Plaintiffs whether they believed the ATU ad

27 <sup>1</sup> Defendant is a public transportation benefit authority organized under Washington  
28 law. It provides public transportation services in Spokane County.

**ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY  
JUDGMENT; DISMISSING CASE WITHOUT PREJUDICE \* 3**

1 was allowable. Plaintiffs eventually responded to STA that they believed the ad  
 2 qualified as an acceptable ad under STA's Policy. STA responded that Plaintiffs  
 3 were incorrect. Plaintiffs then informed ATU there would be a delay in approval of  
 4 the ad.

5 On November 16, 2017, STA terminated Plaintiffs' contract because of  
 6 Plaintiffs' "repeated errors in applying the ad policy to proposed ads." It also  
 7 refused to allow ATU to place ads on its buses.<sup>2</sup>

8 Plaintiffs brought this lawsuit asserting three claims: (1) First Amendment  
 9 retaliation claim; (2) tortious interference with business expectancy claim; and (3)  
 10 a claim for declaratory action under Wash. Rev. Code § 7.24.

### 11 First Amendment Claim

12 As a general matter, the First Amendment prohibits government officials  
 13 from subjecting an individual to retaliatory actions for engaging in protected  
 14 speech. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). Even so, a state as an  
 15 employer has an interest in regulating the speech of its employees that differ  
 16 significantly from those it possesses in connection with regulation of the speech of  
 17 the citizenry in general. *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. of Will*  
 18 *Cnty., Ill.*, 391 U.S. 563, 568 (1968). This is because the state as an employer has  
 19 an interest "in promoting the efficiency of the public services it performs through  
 20 its employees." *Id.* As a result, "a governmental employer may impose certain  
 21 restrictions on the speech of its employees, restraints that would be unconstitutional  
 22 if applied to the general public." *Id.*

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25 <sup>2</sup> ATU sued STA in district court, alleging violations of its rights under the First  
 26 and Fourteenth Amendment. *Amalgamated Transit Union Local 1015 v. Spokane*  
 27 *Transit Auth.*, 929 F.3d 643, 649 (9th Cir. 2019). The Circuit concluded that STA  
 28 unreasonably applied its Ad Policy in rejecting ATU's ad. *Id.* at 655-657.

**ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY  
 JUDGMENT; DISMISSING CASE WITHOUT PREJUDICE \* 4**

1 Plaintiffs urge this Court to view its speech as private individual speech.

2 Defendants assert that Plaintiffs were not speaking as private citizens; instead, they  
3 were speaking as an independent contractor and thus, the proper test to apply is set  
4 out in the *Pickering/Garcetti* line of cases.

5 In evaluating whether a party should be considered a public employee, the  
6 Court considers whether the relationship between the parties is analogous to that  
7 between an employer and employee and whether the rationale applies for balancing  
8 the government's interest in efficient performance of public services against the  
9 public employee's speech right. *Clairmont v. Sound Mental Health*, 632 F.3d 1091,  
10 1100 (9th Cir. 2011). An independent contractor who provides services to the  
11 government is generally treated like a public employee for purposes of determining  
12 whether the contractor has alleged a violation of their First Amendment rights. *Id.*  
13 at 1101. The Ninth Circuit has instructed that when a business vendor operates  
14 under a contract with a public agency, its First Amendment retaliation claim under  
15 § 1983 is analyzed using the same basic approach the court would use if the claim  
16 had been raised by an employee of the agency. *Id.* (citation omitted).

17 Here, it is undisputed that section 1.10 of the contract between Plaintiffs and  
18 Defendant STA specifically indicated that Plaintiffs would be acting as an  
19 independent contractor. Based on this language and based the guidance from the  
20 Ninth Circuit, the Court finds that the proper lens to view Plaintiffs' speech is as an  
21 independent contractor, and thus, the proper test to apply is the *Pickering/Garcetti*  
22 line of cases.

23 In *Garcetti v. Ceballos*, the U.S. Supreme Court set forth a sequential five-  
24 step inquiry that expanded the *Pickering* test used to determine whether a public  
25 employee established a First Amendment retaliation claim. 547 U.S. 410, 421  
26 (2006). This test asks: (1) whether the plaintiff spoke on a matter of public  
27 concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3)  
28 whether the plaintiff's protected speech was a substantial or motivating factor in

**ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY  
JUDGMENT; DISMISSING CASE WITHOUT PREJUDICE \* 5**

1 the adverse employment action; (4) whether the state had an adequate justification  
 2 for treating the employee differently from other members of the general public;  
 3 and (5) whether the state would have taken the adverse employment action even  
 4 absent the protected speech. *Id.*

5 (i) *Matter of Public Concern*

6 Generally, courts are to define the scope of the public concern element  
 7 broadly and adopt a liberal construction of what an issue of public concern is under  
 8 the First Amendment. *Clairmont*, 632 F.3d at 1103 (quotation omitted). In doing  
 9 so, courts should use the framework set forth in *Connick v. Myers*, which reviews  
 10 “the content, form, and context of a given statement, as revealed by the whole  
 11 record.” *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)). Content is  
 12 generally understood to be the “greatest single factor in the *Connick* inquiry.” *Id.*  
 13 (quotation omitted). In this regard, speech that helps the public evaluate the  
 14 performance of public agencies addresses matters of public concern. Although not  
 15 dispositive, a small or limited audience weighs against a claim of protected speech.  
 16 *Id.* (citation omitted). For example, when speech takes the form of an internal  
 17 employee grievance, and is not presented to the public, that form “cuts against a  
 18 finding of public concern.” *Id.* (quotation omitted). Finally, when a public  
 19 employee’s contested speech occurs in the context of an internal power struggle or  
 20 personal employment grievance, this will mitigate against a finding of public  
 21 concern. *Id.*

22 Whether speech is a matter of public concern is a question of law to be  
 23 determined by the court. *Greisen v. Hanken*, 925 F.3d 1097, 1109 (9th Cir. 2019).  
 24 Plaintiffs bear the burden of showing that the speech addressed an issue of public  
 25 concern. *Id.*

26 Here, Plaintiffs have not shown their speech related to a matter of public  
 27 concern. Their speech in approving or supporting a particular ad did not deal with  
 28 the functioning of the government; did not help the public evaluate the

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1 performance of public agencies; and did not discuss threats to public safety. See  
2 *Clairmont*, 632 F.3d at 1104. Moreover, it appears that the form of the speech was  
3 emails that were sent internally and was not presented to the public. See  
4 *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709-10 (9th Cir. 2009). This  
5 type of speech “cuts against a finding of public concern.” *Id.* at 715. The context  
6 and point of Plaintiffs’ speech were not to bring “to light a potential or actual  
7 discrimination, corruption, or other wrongful conduct by government officials.”  
8 See *Clairmont*, 632 F.3d at 1104 (citation omitted). Rather, it was simply  
9 Plaintiffs’ interpretation of its own and STA’s Ad Policy. Plaintiffs never indicated  
10 they believed the union’s proposed ads deserved First Amendment protections or  
11 that STA was violating the union’s First Amendment rights by rejecting the  
12 proposed ad. As such, Plaintiffs’ First Amendment claim fails as a matter of law.

(ii) *Private or Public Citizen*

14 Additionally, Plaintiffs' speech is not protected by the First Amendment  
15 because it was in the context of performing their official job duties. *See id.* (citing  
16 *Garcetti*, 547 U.S. at 426). By sending the emails in supporting or approving the  
17 union's ad, Plaintiffs were not speaking or acting as private citizens. Rather, in the  
18 course of offering to sell ad space on STA buses, in evaluating the ad for content  
19 compliance according to the policies, in deciding whether to run the ad, and in  
20 advising STA and the union that they believed the ad was acceptable, Plaintiffs  
21 were operating within the confines of their contract with STA. There simply would  
22 be no other reason to make their "speech." *See Posey v. Lake Pend Oreille Sch.*  
23 *Dist. No. 84*, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008) ("[S]tatements are made in  
24 the speaker's capacity as a citizen if the speaker had no official duty to make the  
25 questioned statements, or if the speech was not the product of performing the tasks  
26 the employee was paid to perform."). In sending the emails, Plaintiffs were  
27 carrying out their obligations under the contract of screening proposed ad content,  
28 making a compliance determination, and expressing their compliance conclusion.

**ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY  
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1 Because of this, Plaintiffs' First Amendment claim fails as a matter of law.

### 2 Qualified Immunity

3 Individual defendants named in a § 1983 action may raise the defense of  
 4 qualified immunity. Qualified immunity shields officials from civil liability so long  
 5 as their conduct "does not violate clearly established statutory or constitutional  
 6 rights of which a reasonable person would have known." *Mullenix v. Luna*, \_\_ U.S.  
 7 \_\_, 136 S. Ct. 305, 308 (2015) (quotation omitted). A clearly established right is  
 8 one that is "sufficiently clear that every reasonable official would have understood  
 9 that what he is doing violates that right." *Id.* (quoting *Reichle v. Howards*, 566 U.S.  
 10 658, 663 (2012)). This means that existing precedent must have placed the  
 11 statutory or constitutional question beyond debate. *Ashcroft v. al-Kidd*, 563 U.S.  
 12 731, 741 (2011). This inquiry "must be undertaken in light of the specific context  
 13 of the case, not as a broad general proposition." *Mullenix*, 136 S. Ct. at 308  
 14 (quotation omitted).

15 Thus, the qualified immunity analysis involves two steps. *Pearson v.*  
 16 *Callahan*, 555 U.S. 223, 232 (2009). A district court must determine whether the  
 17 facts that a plaintiff has alleged or shown make out a violation of a constitutional  
 18 rights and must decide whether the right at issue was "clearly established" at the  
 19 time of the defendant's alleged misconduct. *Id.* Courts may grant qualified  
 20 immunity on the ground that a purported right was not "clearly established" by  
 21 prior case law without resolving the often more difficult question of whether the  
 22 purported right exists as all. *Id.* at 236.

23 Plaintiffs have the burden to overcome a defendant official's qualified  
 24 immunity by showing that those rights were clearly established at the time of the  
 25 conduct at issue. *Davis v. Scherer*, 468 U.S. 183, 196 (1984).

26 Because the Court has concluded that Plaintiffs have failed to show that their  
 27 First Amendment rights were violated, it is not necessary to determine whether that  
 28 right was clearly established. Even so, the Court finds that Defendant Meyer is

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1 entitled to qualified immunity because the First Amendment right asserted by  
 2 Defendants was not clearly established. As the Court sees it, the “clearly  
 3 established” question is whether it was sufficiently clear to put Defendant Meyers  
 4 on notice that, when she terminated Plaintiffs’ contract because she perceived they  
 5 were erroneously interpreting STA’s Ad Policy, she would have violated their First  
 6 Amendment rights. The answer to this question is no.

7 Plaintiffs rely on *Metro Display Adver., Inc. v. City of Victorville, et al.*, 143  
 8 F.3d 1191, 1195-96 (9th Cir. 1998) to assert it was clearly established that a public  
 9 transit company cannot retaliate against a lessee of its advertising space for pro-  
 10 union ad content. They also rely on *Bigelow v. Virginia*, 421 U.S. 809 (1975) to  
 11 assert it was clearly established that speech is not stripped of First Amendment  
 12 protection merely because it appears in the form of paid, commercial  
 13 advertisement.

14 Neither of these cases, however, clearly establish that a transit service would  
 15 violate its advertising contractor’s First Amendment rights if it rejected a third-  
 16 party ad that the contractor had previously approved. First, *Metro Display* was a  
 17 case involving blatant viewpoint discrimination. *Metro Display*, 143 F.3d at 1195.  
 18 At best, the *Metro Display* case clearly establishes that city council members  
 19 violate the First Amendment if they regulate the viewpoint of bus shelter  
 20 advertisements. *Id.* at 1195. In this case, however, there is nothing in the record to  
 21 suggest that Ms. Meyers engaged in viewpoint discrimination. *See Amalgamated*  
 22 *Transit Union Local 1015 v. Spokane Transit Auth.*, 929 F.3d 643, 650, 656 n.11  
 23 (9th Cir. 2019) (Judge Quackenbush found that STA did not engage in viewpoint  
 24 discrimination, and the Ninth Circuit declined to address whether STA’s rejection  
 25 of the ad was motivated by viewpoint discrimination).

26 Moreover, while *Bigelow* held that advertising is not stripped of all First  
 27 Amendment protection, it noted that it may be subject to reasonable regulation that  
 28 serves a legitimate public interest. *Bigelow* 421 U.S. at 825. It declined to decide,

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1 however, “the extent to which constitutional protection is afforded commercial  
 2 advertising under all circumstances and in the face of all kinds of regulation.”  
 3 *Bigelow* 421 U.S. at 826. *Bigelow* does not provide the level of specificity required  
 4 by *al-Kidd* to put Defendant Meyer on notice that her allegedly wrongful conduct  
 5 would have violated Plaintiffs’ First Amendment rights.

6 Finally, in order to defeat qualified immunity where the *Pickering/Garcetti*  
 7 test is applicable, a plaintiff must show that it was clearly established that the  
 8 speech at issue was on a matter of public concern and the employee’s speech  
 9 interests outweigh the state’s legitimate administrative interests. *See Rivero v. City*  
 10 *and Cty. of San Francisco*, 316 F.3d 857, 865 (9th Cir. 2002). Here, Plaintiffs have  
 11 not shown that it was clearly established that an independent contractor’s rejection  
 12 or acceptance of an ad pursuant to the governmental policy was speech on a matter  
 13 of public concern.

14 As such, Defendant Meyer is entitled to qualified immunity.

### 15 **Supplemental Jurisdiction**

16 28 U.S.C. § 1367 grants federal courts supplemental jurisdiction over state  
 17 law claims. District courts may decline to exercise such supplemental jurisdiction  
 18 where: (1) the claim raises a novel or complex issue of State law; (2) the claim  
 19 substantially predominates over the claim or claims over which the district court  
 20 has original jurisdiction; (3) the district court has dismissed all claims over which it  
 21 has original jurisdiction, or (4) in exceptional circumstance, there are other  
 22 compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). District courts  
 23 may decline to exercise jurisdiction over supplemental state law claims in the  
 24 interest of judicial economy, convenience, fairness, and comity. *Smith v. Lenchey*,  
 25 263 F.3d 972, 977 (9th Cir. 2001).

26 Here, the Court declines to exercise supplemental jurisdiction over  
 27 Plaintiffs’ state law claims because it has dismissed the claim over which it had  
 28 original jurisdiction. The remaining state law claims would be better addressed in

**ORDER GRANTING DEFENDANTS’ MOTIONS FOR SUMMARY  
 JUDGMENT; DISMISSING CASE WITHOUT PREJUDICE \* 10**

1 state court.

2 Accordingly, **IT IS ORDERED:**

3 1. Plaintiffs' Motion for Partial Summary Judgment – Affirmative  
4 Defenses, Nos. 6, 7, and 8 (No First Amendment Issue), and Nos. 13, 15, and 17  
5 (Qualified Immunity, ECF No. 40, is **DENIED**.

6 2. Plaintiffs' Motion for Partial Summary Judgment – Defendant Spokane  
7 Transit Authority's Counterclaim – Doctrine of Account Stated, ECF No. 44, is  
8 **DENIED**.

9 3. Plaintiffs' Motion for Partial Summary Judgment – Affirmative Defenses  
10 No. 6 and 7 to Defendant Spokane Transit Authority's Counterclaim, ECF No. 57,  
11 is **DENIED**.

12 4. Defendants' Motion for Summary Judgment – First Amendment  
13 Retaliation, ECF No. 45, is **GRANTED**.

14 5. Defendants' Motion for Summary Judgment – Qualified Immunity, ECF  
15 No. 49, is **GRANTED**.

16 6. Plaintiffs' Motion to Exclude Portions of the Proposed Testimony of  
17 Shelley Lewis, MA, CRC, CLCP, ABVE/D, ECF No. 55, is **DENIED**, as moot.

18 7. Defendants' Motion to Exclude Plaintiffs' Expert Witness Colleen  
19 McMahon's Testimony under *Daubert*, ECF No. 61, is **DENIED**, as moot.

20 8. Plaintiffs' Motion to Exclude Untimely Disclosed Opinions of Shelley  
21 Lewis, ECF No. 73, is **DENIED**, as moot.

22 9. Defendants' Motion to Strike Plaintiffs' Reply Brief [ECF #99] Or,  
23 Alternatively, for Leave to File Sur Reply, ECF No. 102, is **DENIED**, as moot.

24 10. Defendants' Motion to Expedite, ECF No. 103, is **DENIED**, as moot.

25 11. Defendants' Motion to Strike, ECF No. 105, is **DENIED**, as moot.

26 12. All other pending motions, ECF Nos. 111, 112, 113, are **DENIED**, as  
27 moot.

28 **ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY  
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1       13. The District Court Executive is directed to enter judgment in favor of  
2 Defendants and against Plaintiffs on the First Amendment claims.

3       14. The remaining state law claims are dismissed without prejudice.

4       15. The parties' Joint Motion to Suspend Remaining Pretrial Deadlines and  
5 Schedule Status Conference, ECF No. 117, is **DENIED**, as moot.

6       **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
7 this Order, enter judgment, provide copies to counsel, and **close** the file.

8       **DATED** this 22nd day of September 2020.



12       Stanley A. Bastian

13       Stanley A. Bastian  
14       Chief United States District Judge

29  
30       **ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY  
31       JUDGMENT; DISMISSING CASE WITHOUT PREJUDICE \* 12**